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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 503

HELEN JENKINS KINGTON,
Widow of Joe D. Kington, Jr.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Helen Jenkins Kington prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 11, 1968.

OPINIONS BELOW

The opinion for the United States District Court for the Eastern District of Tennessee, Northern Division is not reported. The opinion of the Court of Appeals for the Sixth Circuit is as yet unreported. The opinion of the Court of Appeals for the Sixth Circuit is appended hereto as Appendix A.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on June 11, 1968. The jurisdiction for this Court is invoked under 28 U.S.C.A. § 1346(b).

QUESTION PRESENTED

Should the District Court have sustained the defendant-appellee's motion for dismissal on the ground that the plaintiff-appellant has failed to timely file her suit? More simply stated: Is a plaintiff in a wrongful death action under the Federal Tort Claims Act barred if she files suit more than two years after the death of her husband but less than two years after the cause of death is discovered?

STATUTES INVOLVED

The statutes which are involved in this case are *28 United States Code Annotated 2401(b)* and *5 New Mexico Statutes Annotated 22-20-1 and 2* copied below.

28 United States Code Annotated 2401(b)

"(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year

after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

5 New Mexico Statutes Annotated 22-20-1 and 2

"22-20-1. Death by wrongful act or neglect—Liability in damages.—Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"22-20-2. Limitation of actions.—Every action instituted by virtue of the provisions of this and the preceding section must be brought within three (3) years after the cause of action shall have accrued."

STATEMENT

This action was brought under the Federal Tort Claims Act, 28 U.S.C.A. 2671, et seq. Jurisdiction existed under 28 U.S.C.A. 1346(b).

Joe D. Kington, Jr. allegedly worked in a plant operated by the United States during the years 1946 and 1947. During this period he was subjected to substances of an inherently dangerous character, including beryllium. On July 6, 1964, Kington died and an autopsy was later conducted at the Massachusetts Institute of Technology. The result of this autopsy, which was not known until September 1, 1964, allegedly indicated that Kington's death resulted from his having been negligently exposed to beryllium. As a result of this discovery, Joe D. Kington's widow, who is the appellant here, filed a Petition in the First Judiciary District Court for Los Alamos, New Mexico. This suit was later dismissed without prejudice. On August 29, 1966, more than two years after the death of Joe D. Kington, but within two years of discovery of the cause of death or action, the suit in question here was filed in the Federal District Court for the Eastern District of Tennessee. In this suit, the allegations set out above were enumerated and it was further alleged that the defendant, United States of America, knew, or should have known of the danger to persons handling such radioactive substances as beryllium, and that the defendant was negligent in its operation of the plant where Kington worked, and that it was negligent in failing to warn of the dangerous qualities of the materials with which he worked. Appellant sued for the wrongful death of her husband and her physical and mental anguish, loss of his earning capacity, for curtailment of his life expectancy, enjoyment of life and for medical expenses. The defendant, United States of America, on November 8,

1966, filed a motion for summary judgment and in the alternative for dismissal on the grounds that the appellant's action was not timely filed within two years of the accrual of the claim as required under 28 U.S.C.A. 2401(b). The defendant submitted other grounds for dismissal not pertinent here. This motion was denied without prejudice. Subsequently, the defendant moved for a reconsideration of the Court on its denial of the earlier motion. The lower court then sustained this motion for dismissal on the grounds that the plaintiff-appellant's action was not timely filed.

Appellant points out that she is in no way depending on this dismissed suit and/or any saving statute to preserve her cause of action in this case. It has been held in *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), and *Jones v. United States*, 126 F. Supp. 10 (D.D.C. 1954), that the fact that a claimant has instituted another action against the United States on the same claim, which was subsequently dismissed, does not interrupt or toll the limitations period under the Federal Tort Claims Act.

Appellant then filed suit on August 29, 1966, in the Federal District Court Eastern District of Tennessee. On motion of the defendant, the Court dismissed the appellant's action because it was not timely filed.

The code section in question in this appeal, in pertinent part, did read as follows at the time this cause was instituted:

> ". . . a tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . ." 28 U.S.C.A. 2401(b).

Although there is a minority view as expressed in *Tessier v. U. S.*, 269 F.2d 305 (1st Cir. 1959), and

Jackson v. U. S., 182 F. Supp. 907 (D. Md. 1960), the compelling majority of federal courts have held that, under the Federal Tort Claims Act, the question, when does the claim accrue, is determined by reference to federal law. See *Foote v. Public Housing Commissioner of U. S.*, 107 F. Supp. 270 (W.D. Mich. 1952); *Bizer v. U. S.*, 124 F. Supp. 949 (N.D. Calif. 1954); *United States v. Reid*, 251 F.2d 691 (5th Cir. 1958); *Beech v. U. S.*, 345 F.2d 872 (5th Cir. 1965); *Quinton v. U. S.*, 304 F.2d 234 (5th Cir. 1962); *Hungerford v. U. S.*, 307 F.2d 99 (9th Cir. 1962); *Kossick v. U. S.*, 330 F.2d 933 (2nd Cir. 1964); and *Brown v. U. S.*, 353 F.2d 578 (9th Cir. 1965). "If the plaintiff has a cause of action against the government under the state law, federal law then controls as to whether the plaintiff has timely instituted his suit to recover on that cause of action." *Quinton*, *supra*, at 240. ". . . Federal law governs in determining whether a claim has 'accrued' within the meaning of the act." *Hungerford*, *supra*, at 102. Moreover, the lower district court in hearing this cause admittedly has adopted the majority view; for, in the case of *Mahoney v. U. S.*, 216 F. Supp. 523, (E.D. Tenn. 1962), while refusing to grant the Government's Motion for Summary Judgment, the Court cited *Quinton* as authority that federal law fixes the date upon which the Federal Tort Claims period of limitations commences to run.

Appellant places great reliance on the fact that the courts have decided that federal law determines when a claim accrues in regard to the Tort Claims Act, for, under this federal law, numerous cases have been decided on the grounds that a claim under the Federal Tort Claims Act does not accrue until the negligence or wrongful acts on the part of the Government are discovered or, in the exercise of reasonable diligence, could have been dis-

covered; *Bizer v. U. S.*, *supra*; *U. S. v. Reid*, *supra*; *Beech v. U. S.*, *supra*; *Quinton v. U. S.*, *supra*; *Hungerford v. U. S.*, *supra*; *Kossick v. U. S.*, *supra*, and *Brown v. U. S.*, *supra*. "(T)he most sensible and just rule to be applied . . . is that a claim for malpractice accrues against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." *Quinton*, *supra*, 240. As indicated by this quoted wording, the question of when does a claim accrue arises usually in malpractice cases. However, there are instances not involving malpractice where the rule that the date of discovery is the date of accrual is applicable. In fact, the lower district court which held against the appellant in this cause has so decided. In the case of *Kuhne v. U. S.*, 250 F. Supp. 523 (E.D. Tenn. 1965), the climant alleged that he had been exposed to radiation while working at Oak Ridge, Tennessee, during the years 1943-45. He further alleged that as a result of this exposure he suffered from a condition diagnosed as myelofibrosis-myeloid metoplasia and that his condition was not diagnosed until 1965. Claimant brought suit under the Tort Claims Act against the United States for its negligence in connection with said exposure. The Government moved for summary judgment, but the Court held that, if the claimant's allegation as to the date of diagnosis were true and the Government's negligence could be proven, he would be entitled to recover notwithstanding the two-year period of limitations for tort claims. See also *Mahoney v. U. S.*, *supra*.

Therefore, in this case appellant contends that, since the cause of death of the deceased or the alleged negligence of the defendant was not discovered until September 1, 1964, any claim should not be barred until after Sep-

tember 1, 1966. Since appellant did file suit within this period, she urges that the lower court was in error in adjudging her out of time. Appellant contends that the lower court's holding was contrary to the federal rule as set out above—that the period of limitations does not begin to run until the discovery of negligence.

In its supporting memorandum, the lower court points out that no cases have been found holding that a suit may be brought under the Federal Tort Claims Act longer than two years after the death of the injured person and that if suits could be brought after two years, representatives of the deceased could postpone the running of the limitations period in the Act for an interminable period upon failure to discover the cause of death. This could result, the Court said, in actions many years later when the deceased as well as other witnesses would not be available.

Appellant concedes that no cases can be found holding that a cause can be brought later than two years after the date of the death of the deceased, but appellant can find no cases stating that such an action could not be brought. It appears that this cause involves a question yet undecided by the federal courts in interpreting the Tort Claims Act; nor can the appellant find any pertinent cases involving discovery under comparable federal statutes. Appellant contends that the reasoning of the lower court that allowance of suits more than two years after the death would result in actions many years later when the deceased as well as other witnesses would not be available is inconsistent with the lower court's holding in *Kuhne v. U. S.*, *supra*. There, the alleged negligence took place some twenty years before discovery yet the same court held that the claimant was not barred. Surely many potential witnesses could no longer be available in that case. The fact that the deceased is no longer available is certainly

unimportant and irrelevant as is proved by recoveries in hundreds of ordinary wrongful death cases. Appellant would have the court hypothesize a situation where the defendant's negligence was not discovered until more than two years after death because of delay in autopsy results, or other reasons. Under the holding of the lower court, any action under the Tort Claims Act would be barred because not timely. Appellant urges that this would not serve the purposes of the Tort Claims Act nor would it be in accordance with the federal rule that the claim accrues at the date of the discovery. Furthermore, appellant asks: Would this not be contradictory to the following wording of the Court of the Fifth Circuit in *Quinton v. U. S.*, *supra*, at 241:

> "We can see no sound reason for permitting the Government to escape liability . . . simply because its alleged negligence was such as to remain undiscovered and, practically speaking, undiscoverable, for many years thereafter. We do not believe that Congress 'intended such consequences to attach to blameless ignorance.'"

The lower court further reasoned that the appellant's cause of action was derived from the cause of action which the decedent would have had had he lived and that since no cases could be found holding that a cause of action accrues subsequent to death, the appellant, therefore, was without cause. Appellant contends first that Joe D. Kington could have brought an action twenty or thirty years from now until he discovered the defendant's alleged negligence; but he had not made such discovery at the time of his death. Therefore, to say that appellant was out of time because her action is only the action which the deceased could have brought at his death is error because he had no action which had accrued at the time of

his death. Secondly, appellant asserts that the Court was not necessarily correct in stating that, if the decedent had no cause of action, then the survivor had no claim. In 22 Am. Jur. 2d, *Death*, Section 37, these words are found.

> "There is authority holding that the fact that the statutory time had run in the decedent's right of action for damages for his injuries does not bar the right of the next of kin to maintain an action for wrongful death. This conclusion has been based on the theory that the right of the next of kin in an action for wrongful death were those of decedent end . . . are rights over which the decedent can have no control and, consequently, they are not affected by what may have happened to the decedent's right of action."

In support of this view, see *Hoover's Adm'x v. Chesapeake and O. Ry. Co.*, 46 W.Va. 268, 33 S.E. 224 (1899). There the deceased was injured by the defendant's negligence but did not die until almost two years later. His administratrix was allowed to bring an action for wrongful death even though the decedent would have been barred because he did not bring an action for damages within one year. See also *Causey v. Seaboard Air Line R. Co.*, 166 N.C. 5, 81 S.E. 917 (1914); *DeHart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 39 Ohio Ops. 101, 85 N.E.2d 586 (1948). Also see the recent Mississippi case of *Ingalls Ship Building Corp. v. Dependents of Harris*, 187 So. 2d 886 (Miss. 1966), where plaintiffs brought action for Workmen's Compensation death benefits resulting from heart attacks suffered by the deceased three and five years before his death. The deceased had not made a claim for compensation within the statutory period; but the Court held that the plaintiffs were not barred when they brought the death action within two years after death.

Under these decisions, therefore, the fact that the decedent did not have a cause of action would not affect the right of the claimant as long as she brings her action within the statutory period after the accrual of the claim —which in the case at hand, is the time when the negligence of the defendant was discovered.

Furthermore, in cases decided under the Tort Claims Act involving death actions, the courts have, upon at least two occasions, held that state periods of limitations for bringing wrongful death actions are inapplicable in such situations even though such periods are considered substantive and not merely statutes of limitations. See *State of Maryland To Use of Burkhardt v. U. S.*, 165 F.2d 869 (4th Cir. 1947), and *Young v. U. S.*, 184 F.2d 587 (D.C. Cir. 1950). These decisions indicate that federal law under the Tort Claims Act has so preempted local law that, in any situation involving timeliness of action, federal law is controlling. It would therefore, be of no consequence that, under the local law, a claimant's action for wrongful death is dependent upon any action which might have been at the disposal of the deceased.

Finally, in the event the Court would disregard her other arguments and hold that the effects of any state wrongful death statute are controlling. The plaintiff points out that under the New Mexico wrongful death statute, any action can be brought within three years of the accrual of a cause of action. See 5 N.M.S.A. 22-20-1 and 2. This limitation period would be controlling over any period under Tennessee law; for the Tennessee courts have held that a right of action for wrongful death is governed by the law of the state where the wrongful injury occurred. *Sharp v. Cinn., N.O. & T.P.R. Co.*, 133 Tenn. 1, 179 S.W. 375 (1915); *Parsons v. American*

Trust Co., 168 Tenn. 49, 73 S.W. 2d 698 (1934). As the appellant did bring her action well within the three-year period after the death of her husband, under the above New Mexico statute, she is not barred.

REASONS FOR GRANTING WRIT

The writ of certiorari should be granted in order to review the proceedings to date which bar an action commenced under the Federal Tort Claims Act, which was instituted within two years after the cause of death became known to petitioner. It appears that an important question of Federal law is involved, which has as yet been undecided by the Federal courts in interpreting the Federal Tort Claims Act. Radiation injuries are such that in many cases confirmation of causation cannot be determined until a specialized autopsy is completed. The petitioner respectfully asserts that both the District Court for the Eastern District, Northern Division of Tennessee, and the Court of Appeals for the Sixth Circuit erroneously decided the question presented, and that the case law presented in the action has not been adequately refuted by the courts, nor does petitioner believe that the lower courts have really answered the questions posed in the suit.

The petitioner realizes that this Court has been reluctant to consider these types of cases in the past. However, she feels that this case is most meritorious and cries out for relief. It is her hope that this Court will take into consideration the fact that many courts have previously decided that the Federal law determines when a claim accrues in regard to the Tort Claims Act and, also prays that the Court take into consideration the actual purpose of the Federal Tort Claims Act, which

was, first, to relieve Congress of the overwhelming pressures and burdens of private relief bills and, secondly and most important in the case at bar, to do justice to those who have suffered injuries or losses through the wrongs of Government employers. Petitioner would ask that the Court follow the reasoning of the Fifth Circuit in *Quinton v. U. S.*, *supra*, "We can see no sound reason for permitting the Government to escape liability ... simply because its alleged negligence was such as to remain undiscovered and, practically speaking, undiscoverably for many years thereafter. We do not believe that Congress intended such consequences to attach to blameless ignorance."

In conclusion, petitioner contends, as does the dissenting judge in the Court of Appeals' decision, that the Court of Appeals for the Sixth Circuit based its conclusion upon the fact that petitioner had 22 months from discovery of the cause of death to bring the action. Petitioner feels that this wording is totally irrelevant. It is likened to saying that a plaintiff in an ordinary personal injury suit is barred by the statute of limitations when he brings his suit 11 months and 29 days after the accident because he had plenty of time to file a suit in the previous period. Justice Edwards, dissenting in the Court of Appeals' decision, quotes *Urie v. Thompson*, 337 U.S. 163, 169, 170 (1949), which dealt with a three-year statute of limitations under the Federal Employers' Liability Act. In this case, the Supreme Court said:

> "In our view, however, neither of the outlined constructions of the statute of limitations can be sustained. For, if we assume that Congress intended to include occupational diseases in the category of injuries compensable under the Federal Employers' Liability and

Boiler Inspection Acts, such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose.

"If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate date of recovery and disability.

"We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."

Petitioner also relies on the fact that the Fifth, Ninth and Second Circuits have applied the reasoning of *Urie* to the Federal Tort Claims Act limitation in 28 U.S.C.A., Section 2401(b), the identical section being construed in this case. It is the prayer of petitioner that the United States Supreme Court will determine in accord with what petitioner believes is the purpose and legislative intent of the Federal Tort Claims Act and grant relief to

petitioner, who duly filed her action within two years after notice of the invasion of her legal rights.

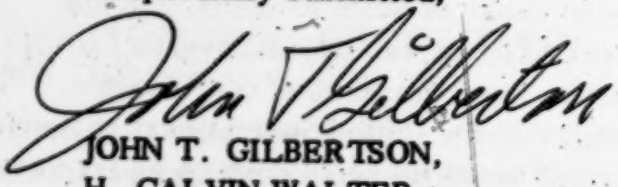
CONCLUSION

As petitioner has indicated in her statements as to the facts of the case and in her reasons for belief that certiorari should be granted in this case, it appears that an important question of federal law is involved which has as yet been undecided by the federal courts in interpreting the Federal Tort Claims Act. The nature of the injuries which petitioner's husband sustained were such that legitimate causation could not be determined until a specialized autopsy was completed. Indeed, as scientific use of atomic energy increases, there will necessarily be a greater possibility of an increase in radiation injuries. It is the petitioner's belief that the Court should formulate a standard in regard to the statutes of limitation in Federal Tort Claims to cope with these unusual radiation injuries. Moreover petitioner feels that the legislative intent of the Congress in passing the Federal Tort Claims Act was to do justice to those who suffered injuries or losses through government employers. In the case at bar, both time and expense were allocated to determine in good faith the actual cause of death to Joe D. Kington. In so doing, the cause of death was not discovered for approximately two months after the death of Mr. Kington. It is petitioner's belief that the United States Court of Appeals for the Sixth Circuit based its conclusion on an irrelevant theory in stating that petitioner had 22 months to appeal the case. The Court of Appeals seemed to indicate that this was a reasonable amount of time to appeal. Petitioner might hypothesis that in perhaps the next case to confront the Court of Appeals 18 months, 12 months or some other arbitrary figure may be deemed sufficient time to appeal

and that no conclusive standard will be available to determine the correct length of time for appeal to those who have suffered radiation injuries. Petitioner is being denied her right to try this case on the merits simply because her husband suffered an injury in which causation was of the nature that it could not be immediately determined. We do not believe that Congress intended such consequences, as set out in the Court of Appeals Opinion, to attach to blameless ignorance. Petitioner sincerely believes that in keeping with the intent of the Congress in passing the Federal Tort Claims Act that a certain amount of flexibility will be mandatory in determining the length of time for appeal to those who suffered the hidden injuries of the atomic era. Thus, we feel that the Court must rule on the question as presented and petitioner sincerely believes that the Court will determine the case with the purpose and the legislative intent of the Federal Tort Claims Act, and thus should grant relief to the petitioner who duly filed her action within two years after notice of the invasion of her legal rights.

WHEREFORE the petitioner prays that this petition for certiorari be granted.

Respectfully submitted,



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Attorneys for Petitioner.

September 4, 1968

AFFIDAVIT OF SERVICE

I, John T. Gilbertson, counsel for the Petitioner, being first duly sworn according to law, depose and say:

That I have on the 7th day of September, 1968, caused to be served true and exact copies of the foregoing petition for a writ of certiorari upon counsel as listed below by depositing same in the United States mail with postage prepaid addressed to counsel at their respective addresses.

John T. Gilbertson
JOHN T. GILBERTSON

Sworn and subscribed to before me
this 6th day of September, 1968.

Rita I. Schuenemann
Notary Public

My Commission Expires: 4/25/71

Mr. J. H. Reddy,
United States Attorney,
201 U. S. Post Office Building,
Knoxville, Tennessee 37901.

Solicitor General,
Department of Justice,
Washington, D. C.

APPENDIX A

No. 17949

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[fol. 1]

Helen Jenkins Kington, Widow of Joe E. Kington, Jr.,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee.

APPEAL from United States District Court for the Eastern District of Tennessee, Northern Division.

Decided June 11, 1968

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. The sole question in this appeal is whether an action for wrongful death under the Federal Tort Claims Act "accrues" upon the date of death so as to be barred unless commenced within the two-year period of limitation provided in 28 U.S.C. 2401(b) in effect at that time. It is the claim of the plaintiff that the statute does not commence to run until the cause of death is known.

Plaintiff alleged in her complaint that her husband, during the years 1946 and 1947 while working in a federally-owned facility at Los Alamos, New Mexico, was subjected

to beryllium which subsequently caused his death on July 6, 1964; that the cause of his death was not discovered until September 1, 1964. She filed the present action for wrongful death in the United States District Court for the Eastern District of Tennessee on August 29, 1966, which was more than two years after date of death.

[fol. 2] Her capacity to sue is determined by the law of her domicile which is Tennessee. Rule 17(b) Fed. R. Civ. P. The Tennessee statute provides such authority. T.C.A. Sec. 20-608.

The District Court granted the government's motion for summary judgment on the ground that the action for wrongful death accrued upon the date of death and was, therefore, barred by the two-year period of limitation contained in the Federal Tort Claims Act. 265 F. Supp. 699 (1967).

The Act provides: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. ..." 28 U.S.C. 2401(b). The legislative history of the Act indicates that Congress intended to provide a uniform time limitation in which to bring actions for tort claims rather than the varying periods of state statutes which otherwise would be applicable. The House Committee considered the state statutes of limitation of from one to six years and proposed that the existing one-year limitation in the Act be increased to two years so that it would not be unfair to claimants. H. R. No. 276, 81 Cong., 1st Sess. pp. 3-4 (1949).

In *Foote v. Public Housing Comm'r. of U. S.*, 107 F. Supp. 270, 274-75 (W.D. Mich. 1952), the Court said:

"It seems clear that the Congress intended the period of limitation provided in § 2401(b) to run from

the definitely ascertainable date of death rather than from some indefinite date when an administrator might be appointed."

Plaintiff admits in her complaint that she did learn of the cause of her husband's death within less than two months, namely, on September 1, 1964. Under the Act, she had until July 6, 1966, or about twenty-two months, to bring action which was at least a reasonable length of time. She alleges in her complaint that she did bring action in July, 1965, in the First Judicial District Court, Los Alamos, New Mexico, which was within the two year period. The action was dismissed without [fol. 3] prejudice. In its brief filed in the District Court, the government alleged that the action in the state court was against the Regents of the University of California, the employer of the decedent, and was for workmen's compensation benefits, and is still pending; that plaintiff, on July 2, 1965, filed an action for wrongful death under the Federal Tort Claims Act in the United States District Court for the District of New Mexico. This action was also filed within the two-year period. On January 3, 1966, a voluntary non-suit of the action was taken without prejudice. No reason is given why she voluntarily dismissed her action in the District Court of New Mexico.

It is conceded that the filing of the prior actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year period of limitations in the Act. "An action dismissed without prejudice leaves the situation the same as if the suit had never been brought." *Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962); *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959); *Jones v. United States*, 126 F. Supp. 10 (D.D.C. 1954).

The wrongful death statutes of Tennessee and New Mexico are survival statutes, 4 T.C.A. 20-607; 5 N.M. S.A. 22-20-1. In Tennessee, the cause of action accrues upon the date of injury even though it results in death. Action must be brought within one year from date of injury. T.C.A. 28-304; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572 (1902).

In New Mexico, the period of limitation is three years from the date of injury, not the date of its discovery. 5 N.M.S.A. § 22-20-2. *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963); *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961); *Natseway v. Jojola*, 56 N.M. 793, 251 P.2d 274 (1951).

Thus in Tennessee, as well as New Mexico, the cause of action was barred before decedent's death and did not survive him. Under the Act, the United States shall be liable "relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. In this [fol. 4] case a private person would not have been liable because the action was barred before death occurred. Where, however, the period of limitation is shorter under state law than federal law, the federal courts have applied the longer federal period even though the wrongful death claim had already been barred by state law. *Young v. United States*, 184 F.2d 587 (D.C. Cir. 1950); *State, ex rel. Burkhardt v. United States*, 165 F. 2d 869, 871 (4th Cir. 1947). These rulings would seem to be valid only if the Federal Tort Claims Act is interpreted as creating a cause of action for wrongful death independent of state law.

Appellant argues strenuously that the period of limitation in the Act should not begin to run until the injury is discovered.[1] She relies on decisions in personal injury actions involving malpractice and occupational disease which held that the statute of limitations does not begin to run until plaintiff has discovered or, in the exercise of reasonable diligence, should have discovered the negligent or wrongful acts. *Brown v. United States*, 353 F.2d 578 (9th Cir. 1965); *Beech v. United States*, 345 F.2d 872 (5th Cir. 1965); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *United States v. Reid*, 251 F.2d 691 (5th Cir. 1958). Stated another way, the cause of action accrues "when plaintiff has reason to know he has been injured," *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 503 (4th Cir. 1961), or "when the accumulated effects of the deleterious substance manifest themselves." *Brush Beryllium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960). See also *Urie v. Thompson*, 337 U.S. 163 (1949).

It will be noted that all of the cases relied upon by appellant involve actions for personal injuries in which the plaintiff either did not know, or had no reason to believe, that he had sustained an injury. Appellant has not cited a single case involving wrongful death which supports her position. Our research has disclosed no such cases.

Traditionally an action for wrongful death accrues upon the date of death. 22 Am. Jur. 2d, Death, §40.

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[1] No evidence was taken on this subject in the District Court. Plaintiff admits the discovery was made on the date of autopsy, September 1, 1964. In its motion filed in the District Court on January 25, 1967, the government states: "... [D]eceased was apparently treated from approximately 1950 to his death on July 6, 1964."

[fol. 5] The time when the statute of limitations begins to run is determined by federal law. *Kossick v. United States*, 330 F.2d 933 (2nd Cir. 1964); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962); *Mahoney v. United States*, 216 F. Supp. 523 (E.D. Tenn. 1962); *Foote v. Public Housing Comm'r of United States*, 107 F. Supp. 270 (W.D. Mich. 1952). But see *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1949).

Actions for wrongful death under the Federal Employer's Liability Act accrue at the time of death. *Baltimore & Ohio Southwestern Ry. Co. v. Carroll*, 280 U.S. 491 (1930); *Renaldi v. New York, New Haven & Hartford R.R. Co.*, 230 F.2d 841 (2nd Cir. 1956).

The cause of death is generally known at the time of death or shortly thereafter. The attending physician is required to sign a death certificate indicating the cause of death. T.C.A. §53-439. If the cause is not known, it can be ascertained readily by an autopsy.

In the present case, assuming as we must that the cause of death was unknown at the time of death, it was definitely ascertained in less than two months by the autopsy.

Plaintiff then had at least twenty-two months in which to bring her action. It can hardly be claimed that this time was unreasonable or inadequate.

We are of the opinion that under the Act, the claim for wrongful death accrues upon the date of death.

Affirmed.

[fol. 6] EDWARDS, Circuit Judge, dissenting.

Respectfully, I dissent.

This case presents the single question of whether or not the two-year limitation of time for filing claims under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), bars plaintiff's claim for the asserted negligent death of her husband. The District Court dismissed her claim on motion because it was not filed in time. Her suit was filed more than two years after her husband's death, but within two years of the autopsy which first advised her of the fact that he died from berylliosis.

Beryllium is a dangerous element employed in atomic energy production. Appellant claims that her husband was exposed to this element while he worked for the University of California at a government-owned plant at Los Alamos, New Mexico, in 1946 and 1947 and that she had no way of knowing of the existence of a Federal Tort Claims action until she received the autopsy report.

My colleagues properly point out that thereafter under the facts of this case she still had 22 months of the two-year period of limitations to run and that she reasonably could have filed the instant action within that time.

The difficulty I have with this reasoning is that if, because this plaintiff had 22 months remaining, we adopt the rule that the cause of action "accrues" at death, regardless of whether or not appellant could then have known of the existence of the cause of action, we commit this circuit to a rule which is bound to have totally unreasonable results in other cases where the cause of death is not so promptly discovered.

The extensive nature of the United States Government's participation in atomic energy work suggests that we approach such possibilities with caution as other circuits are doing.

I agree with the opinion of the court in holding that under normal circumstances where the parties have knowledge of the existence of the cause of action, the word "accrues" as used in the Tort Claims Act should
[fol. 7] refer to the event (here, the death) which gives rise to the cause of action.

However, there is a class of cases involving both illness and death where the claimant does not, and in the exercise of normal diligence could not, know of the existence of the cause of action. In such instances, compliance with a statutory time limitation may be impossible. The courts generally seek to avoid a harsh result which cannot be construed as arising from any fault on the part of the plaintiff. In such instances the claim is said not to "accrue" until the element of knowledge, absence of which prevents the filing of the complaint, has been supplied.

Thus in *Urie v. Thompson*, 337 U.S. 163 (1949), dealing with a three-year limitation in the Federal Employers' Liability Act, the Supreme Court said:

> "In our view, however, neither of the outlined constructions of the statute of limitations can be sustained. For, if we assume that Congress intended to include occupational diseases in the category of injuries compensable under the Federal Employers' Liability and Boiler Inspection Acts, such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose.
>
> "If Urie were held barred from prosecuting this action because he must be said, as a matter of law,

to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate date of discovery and disability.

* * *

[fol. 8] "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Urie v. Thompson*, 337 U.S. 163, 169, 170 (1949).

For purposes of this appeal we must assume that appellant did file her claim within the "specified period of time after notice of the invasion of [her] legal rights."[1]

In general accord with this principle of the *Urie* case, and relying on it are *Brush Beryllium Co. v. Meckley*, 284 F.2d 797 (6th Cir. 1960); *Young v. Clinchfield Rail-Road Co.*, 288 F.2d 499 (4th Cir. 1961); *Kossick v. United States*, 330 F.2d 933 (2nd Cir.), *cert. denied*, 379 U.S. 837 (1964); *Hungerford v. United States*, 307

[1] In this regard we rely upon the language of appellant's complaint which, of course, the government had to accept for purposes of its motion to dismiss.

F. 2d 99 (9th Cir. 1962); *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962).

In the last three cases cited, the Fifth, Ninth and Second Circuits have applied the reasoning of *Urie* (quoted above) to the Federal Tort Claims Act limitation in 28 U.S.C. § 2401(b)—the identical section which we construe here.

I would reverse and remand for trial.

[fol. 11a]

APPENDIX B

[Caption Omitted]

MEMORANDUM

(Filed February 21, 1967)

This action was filed under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. Jurisdiction exists under Section 1346(b) of the same Title.

Plaintiff is the widow of the late Joe D. Kington, Jr. and now resides in Anderson County, Tennessee and seeks $250,000 damages for the alleged wrongful death of her husband. She alleges in her complaint that during the years 1946 and 1947 defendant, through its Atomic Energy Commission, engaged in the production and development of atomic energy in its facilities located at Los Alamos, Los Alamos County, New Mexico, and used substances of an inherently dangerous character, including beryllium, a metallic chemical element found only in combination with others; that this was a highly dangerous substance known to the defendants; that the defendant negligently operated its plant in which plaintiff's decedent worked and failed to provide a safe place for him to work, that defendant failed to warn the decedent of the inherently dangerous nature of the materials with which he worked, particularly beryllium, but led him to believe that beryllium was not harmful, and that the deceased while working in said area was subjected to beryllium, which caused his death on July 6, 1964, although the cause of his death was not discovered until September 1, 1964 when the results of his autopsy conducted at the Massachusetts Institute of Technology was made known.

[fol. 12a] Plaintiff further alleges that in July, 1965 she filed a petition in the First Judicial District Court, Los Alamos, New Mexico, which was dismissed without prejudice. Defendant, in its brief, states that this was a state court action against the Regents of the University of California, the employer of the decedent, for workmen's compensation benefits and is still pending; that plaintiff did file, on or about July 2, 1965, in the Federal District Court for the District of New Mexico, a suit against the United States under the Federal Tort Claims Act for the wrongful death of her husband, the same being Civil Action No. 6240; and that on or about January 3, 1966 a voluntary non-suit was taken without prejudice.

The respective briefs indicate that the parties agree that the filing and dismissal of the state and federal actions do not toll the two-year limitations provision under the Federal Tort Claims Act. Their belief is confirmed by applicable law. *Jones v. United States*, 126 F. Supp. 10; *Tessier v. United States*, 269 F.2d 305, 310; *Humphreys v. United States*, 272 F.2d 411; *Bomer v. Ribicoff*, 304 F.2d 427.

Defendant moved for a summary judgment, or in the alternative for a dismissal, upon the grounds:

(a) The Court is without jurisdiction and plaintiff has no cause of action under the Federal Tort Claims Act barring suits that are not instituted within two years after the action accrues. 28 U.S.C. 2401(b). [1]

---

[1] "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . ."

[fol. 13a] (b) This Court is without jurisdiction because of the discretionary function exemption contained in Section 2680 of the Act.[2]

(c) There was no duty on the part of the defendant to affirmatively act with respect to plaintiff's decedent, an employee of an independent contractor with the Government.

(If a decision of the motion depended upon issue No. (c), proof would be required.)

Plaintiff's suit in this Court was filed August 29, 1966, or more than two years after the date of decedent's death which, as previously shown, occurred on July 6, 1964.

We must first determine when the two year period provided for in the Act commenced and whether this is determined by state law or federal law.

Plaintiff says that the cause of action did not accrue until the cause of her decedent's death was discovered, or by the exercise of ordinary care should have been discovered. Defendant says that the cause of action accrued at the date of the alleged injury but in all events not later than the date of the death of Mr. Kington.

The majority of the cases hold that the time the cause of action accrues is determined by federal law. *Foote v. Public Housing Commissioner of United States*, 107 F. Supp. 270; *Quinton v. United States*, 304 F.2d 234; *Hungerford v. United States*, 307 F.2d 99; *Kossick v. United States*, 330 F.2d 933.

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2 Section 2680 provides that the provisions of the Federal Tort Claims Act shall not apply to any claim based upon an act or omission of an employee of the Government while performing a discretionary function or duty for the Government.

[fol. 14a] It was held in *Tessier v. United States*, *supra*, that "a 'claim accrues' . . . when a private person similarly situated would become suable under the law of the state . . ."

The holding in the *Tessier* case appears to be the minority view. This Court has followed the majority view. *Mahoney v. United States*, 216 F. Supp. 523, 536.

It is well settled that the cause of action does not accrue under federal law until the injury is discovered or by the exercise of ordinary care should have been discovered. Ibid, 536.

Both the wrongful death statutes of Tennessee and New Mexico are survival statutes. 4 T.C.A. 20-607, 5 N.M. S.A. 22-20-1.

A suit may be brought in Tennessee within one year from the date the cause of action accrues which even in case of an injury that results in death is the date of the injury. T.C.A. 28-304; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 605.

A suit may be brought in New Mexico within three years from the date of the accrual of the cause of action. 5 N. M.S.A. 22-20-1 and plaintiff's cause of action is derived from the cause of action which the decedent would have had if he had lived. Thus, if the decedent in our case did not have a cause of action had he lived plaintiff, as his representative or beneficiary, would not have a cause of action. Conversely, if the decedent had a cause of action if he had lived, plaintiff as his representative or beneficiary would have the same cause of action. Consequently, plaintiff's cause of action is not independent of the cause of action of the deceased had he lived. If plaintiff has a cause of action, it accrued not later than the date of the death of her husband.

[fol. 15a] We have not been cited to any case and have not found one that holds that a cause of action under the Federal Tort Claims Act accrues at a time subsequent to death in an action to recover damages for wrongful death.

It was held in the case of *Foote v. Public Housing Commissioner of United States, supra*, that an action to recover for death of minor children who were killed while occupying a dwelling unit in the public housing project for veterans at Cadillac, Michigan, a project developed by the public housing authority and the City of Cadillac, was barred by the two year statute of limitations relating to tort claims against the United States.

The case of *Young v. United States*, 184 F.2d 587, involved a claim under the Federal Tort Claims Act to recover damages for death. In the case, the Court held that the two year period fixed by the Federal Tort Claims Act controlled the action rather than the one year statute of limitations of the District of Columbia. The Court stated that if, under the local statute, the time allowed in such cases exceeded that prescribed by the Federal act, the latter would control. A similar conclusion was reached in the case of *Burkhardt v. United States*, 165 F.2d 869, 871.

There is nothing in the Act nor in the interpretation of it that indicates the cause of action accrues at a later date than the death of the deceased.

Each of the cases cited in the briefs, holding that the cause of action did not accrue until the injured party discovered the cause of his disability or by the exercise of ordinary care should have discovered it, involved injuries to living persons instead of wrongful death actions. No

[fol. 16a] case has been cited holding that a suit may be brought under the Federal Tort Claims Act longer than two years after the death of the person injured.

If suits may be brought after two years from death under the Act, representatives of the deceased could postpone the running of the limitation period in the Act for an interminable period upon failure to discover the cause of death. This could result in actions many years later when the deceased as well as other witnesses would not be available. It seems to the Court that this is a controlling reason why a death action should be brought within the two year period of limitation. It is our opinion that Congress did not, in writing the two year period in the Act, intend that there should ever be an unlimited extension thereof.

It results that the motion for dismissal must be sustained.

ROBERT L. TAYLOR
United States District Judge

[fol. 6a] [Caption Omitted]

MOTION FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE FOR DISMISSAL

(Filed November 8, 1966)

Comes the defendant, United States of America, by J. H. Reddy, United States Attorney, and moves the Court for Summary Judgment and in the Alternative for Dismissal of plaintiff's action against defendant on the basis that:

I

The Court is without jurisdiction and plaintiff has no cause of action against the United States under the Federal Tort Claims Act by virtue of the expiration of the jurisdictional two-year period from the date the cause of action, if any, accrued in the decedent as provided by 28 U.S.C.A. 2401(b).

II

The Court is without jurisdiction and plaintiff has no cause of action against the United States under the Federal Tort Claims Act by virtue of the express exemption of the United States from actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" as provided in 28 U.S.C.A. 2680(a).

III

The allegations of acts or omission set forth in the Complaint are not actionable for want of a duty on the part

of the defendant to affirmatively act with respect to plaintiff's decedent, an employee of an independent contractor with the United States. No tortious act or omission on the part of an officer or employee of defendant has occurred, nor has any such act or omission been alleged in the Complaint.

IV

The Complaint fails to state a cause of action against the defendant upon which relief could be granted.

J. H. REDDY
United States Attorney

BY: /s/ G. Wilson Horde
G. Wilson Horde
Assistant United States Attorney

[Certificate of Service Omitted]

Appendix B - Order

[Caption Omitted]

ORDER

(Filed November 17, 1966)

It is ORDERED that the Government's motion for summary judgment be, and same hereby is, denied, without prejudice to renew at pre-trial or at the trial on the merits..

Enter:

ROBERT L. TAYLOR
United States District Judge

* * *

[Caption Omitted]

MOTION OF UNITED STATES FOR RECONSIDERATION BY COURT OF ORDER OF COURT DENYING MOTION OF UNITED STATES FOR SUMMARY JUDGMENT AND/OR DISMISSAL

(Filed January 25, 1967)

Comes the defendant, United States of America, by J. H. Reddy, United States Attorney, and moves the Court to reconsider its denial of defendant's motion to dismiss, with particular reference to Part I of said motion asserting that the Court is without jurisdiction and the action is barred by virtue of plaintiff's failure to commence this action within the period of two years from the date the cause of action, if any, accrued as provided in 28 U.S.C.A. 2401(b). As the basis for this motion for reconsideration, defendant says:

1. That the question of whether the action is or is not barred by the two-year limitations period is a legal question and no fact pertinent to its consideration is believed to be in dispute between the parties.

2. Deceased's place of employment was in Los Alamos, New Mexico, in facilities owned by the Government but operated by the Regents of the University of California, and insofar as defendant knows virtually all persons who would be necessary as witnesses, etc., for both plaintiff and defendant (other than possibly outside expert witnesses) would be located either in California, New Mexico or Massachusetts where deceased was apparently treated from approximately 1950 to his death on July 6, 1964. Preparation for trial on the merits would be extremely costly and time consuming for both plaintiff and defendant, and neither should be put to such burden pending a determination of the legal question where the facts necessary to such determination are not in dispute for purpose of its resolution.

3. The facts which defendant accepts as true and not in dispute for purposes of this motion are:

a. That deceased, an employee of the Regents of the University of California, was employed in a Government-owned facility in 1946 and 1947 as alleged;

b. That deceased died of berylliosis on July 6, 1964, and that the cause of death was not known until September 1, 1964, following an autopsy;

c. That plaintiff, as widow of deceased, filed an action against defendant under the Federal Tort Claims Act based on deceased's death from beryllium exposure arising out of the above employment in the Federal District Court of New Mexico,

[fol. 10a]

being Civil Action No. 6240, on or about July 2, 1965, and that on or about January 3, 1966, plaintiff moved that said suit be dismissed without prejudice, and the court granted such motion and entered its order dismissing the action without prejudice.

d. That on August 29, 1966, plaintiff filed this Civil Action No. 5740 in this Court, as widow of deceased, for deceased's death, etc.

Defendant, United States of America, prays that the Court reconsider its denial of the Government's Motion for Summary Judgment and/or Dismissal and grant said motion, or in the alternative, that the Court set said motion for hearing and oral argument on a day certain, such date being set so as to afford counsel for plaintiff time to submit a brief should plaintiff so desire.

J. H. REDDY,
United States Attorney

By: /s/ G. Wilson Horde
G. Wilson Horde
Assistant U. S. Attorney

[Certificate of Service Omitted]

[fol. 16a] [Caption Omitted]

ORDER

(Filed February 28, 1967)

In this cause, on motion of the United States Attorney, and it appearing to the Court that the Motion for Dismissal filed herein by defendant is well taken, it is

ORDERED that this action be and the same hereby is dismissed. The costs in this action are hereby taxed to plaintiff.

[fol. 17a] Enter:

ROBERT L. TAYLOR
United States District Judge

* * *

[Caption Omitted]

NOTICE OF APPEAL

(Filed April 18, 1967)

Notice is hereby given that Helen Jenkins Kington, widow of Joe D. Kington, Jr., plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order dismissing this cause of action against the United States of America entered on February 21, 1967.

WALTER, GILBERTSON & CLAIBORNE

By: .....
Attorneys for Plaintiff
100 Knox Federal Building
Knoxville, Tennessee 37902

[fol. 1]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17,949

HELEN JENKINS KINGTON,
Widow of JOE D. KINGTON, JR.,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

[FILED: 6/11/68]

BEFORE: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk